Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

October Term, 1997

In The Matter of Jerome Berg, Debtor

JEROME BERG,

Petitioner,

vs.

BRENNAN NEWSOM, *et al.*,

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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1998

QUESTION PRESENTED FOR REVIEW

May a bankruptcy court approve a Chapter 7 trustee's sale of an asset which debtor claims is worth $400,000 for $5,000 with no proof of value submitted by the trustee?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE NINTH CIRCUIT

Jerome Berg respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Ninth Circuit

OPINIONS BELOW

The appended opinion of the Ninth Circuit Court of Appeals (App. 1), is unpublished.

I. JURISDICTIONAL STATEMENT

The United States Bankruptcy Court had jurisdiction pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). The Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 158(d). The decision appealed from is a final judgment, which disposed of the action as to all claims by all parties, and is therefore appealable as of right. (See 28 U.S.C. § 1291; Rule 54 of the Federal Rules of Civil Procedure)

Judgment was entered by the bankruptcy court September 25, 1996.

The United States Court of Appeals for the Ninth Circuit filed its opinion September 18, 1998.

Jurisdiction of the United States Supreme Court is invoked pursuant to 42 U.S.C. § 1252.

II. STATUTORY PROVISIONS

11 U.S.C. § 363 is a lengthy omnibus statute which governs bankruptcy administration of "cash collateral" (including choses in action such as suits initiated by the debtor). Section (b)(1) allows the Trustee in Bankruptcy to sell estate assets "after notice and a hearing."

The statute does not require an evaluation of the asset before sale. Decisional law requires such an evaluation.

III. STATEMENT OF FACTS

Debtor's former Chapter 11 case was converted to Chapter 7 after debtor began the within adversary suit.

This adversary suit was an asset of the Chapter 7 estate, and the Chapter 7 trustee sold it to the suit's defendants pursuant to an order of the bankruptcy court dated September

25, 1996 with no significant findings and none on the merits. (E.R. 92) In the bankruptcy court Debtor objected to that sale, which was inadequately justified by the trustee. (E.R. 67:19-22)

> The court observed:
>
> you haven't given me so much as a declaration of a lawyer for the trustee, a member of your firm or even you yourself that says I have reviewed the matter, that in effect validates it (the original offer to purchase this adversary suit).

(E.R. 17:3-6)

> The court made this further observation:
>
> Even if Mr. Berg weren't here, I wouldn't approve this settlement at this point because there isn't a sufficient analysis of why the case should be settled on these terms.

The trustee conducted a closed bid auction pitting debtor whose non-exempt assets were now out of his hands (in the trustee's custody) against the wealthy lawyer. The bankruptcy court recognized that method could not maximize recovery for the estate because of the disparity of the parties' ability to compete in this comment to defendant's counsel:

> Frankly, you got _ you've got the horsepower.

(E.R. 74:18-19)

And,

> I don't know that we have a level playing field in terms of economic power.

(E.R. 74:24-75:1)

IV. SUMMARY OF THE ARGUMENT

A. A Record Of Valuation Is Required

A Trustee in Bankruptcy's sales of a bankrupt debtor's assets must be justified by a record of neutral evaluation or else creditors could be denied a reasonable dividend by a lazy or corrupt trustee. See Protective Comm. etc. v Anderson 390 U.S. 411, 434-441 [88 S.Ct. 1157, 1168-72] (1968) and Ninth Circuit precedent, Re A & C Properties 784 Fed. 2d 1377, 1381 (9th Cir. 1986), both of which require an adequate record that demonstrates the court was given evidence of the value of the asset being sold to assure a fair price is being brought in to the estate for the benefit of creditors.

V. ARGUMENT

A. The Trustee's Duties

The Trustee in Bankruptcy is charged with liquidating the estate as expeditiously as is compatible with the best interest of the parties in interest. 11 U.S.C. § 704. In re Riverside-Lenden Inv. Co. 925 F.3d 320 (9th Cir. 1991).

A Chapter 7 trustee has a duty "to investigate and litigate potential suits that might be brought on behalf of the debtor." In re United Ins. Mgt. Inc. 14 F.3d 1380, 1386 (9th Cir. 1994) citing Mele v First Colony Life Ins. Co. 127 B.R. 82, 86 (D.D.C. 1991):

> As a fiduciary, [the Chapter 7 trustee's] duty to make inquiry with respect to the real value of the property is at least to do that which he would do for is own self interest.

Matter of Chapin 2 B.R. 373, 375 (B.C. N.D. Ohio, 1980)

B. The Bankruptcy Court's Discretion

A large measure of discretion is available to the bankruptcy court in determining whether a private sale should be approved under 11 U.S.C. § 363. In re Lionel Corp. 722

F.2d 1063, 1069 (2d Cir. 1983). However, "reasons must be given for whatever determination is made." *Id.* at 722 F.2d 1071. None appear here. The Lionel court outlined suggested factors to be set forth in a finding of reasons to approve a sale. The court should exercise its discretion based upon facts and circumstances of the proposed sale. Sale of assets is appropriate if all provisions of § 363 are followed, if the bid is fair, and the sale is in best interest of the estate and its creditors. In re Embrace Sys. Corp. 178 B.R. 112 (1995, BC WD Mich.)

> Before [a] court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to creating a sufficient basis for reaching an informed decision.

United States v D'Amore 56 F.3d 1202, 1205 (9th Cir. 1995). No such record exists here.

C. Elements To Consider When Exercising Discretion To Approve A Private Sale

When determining whether a private sale should be allowed under 11 U.S.C. § 363(b), the bankruptcy court should

consider: 1) whether there is an articulated business justification for selling out of the ordinary course of business; 2) whether the asset is increasing or decreasing in value; 3) what proceeds are to be obtained compared to any appraisals of the property; 4) any other salient factors regarding disposition of the asset. Re Coastal Industries, Inc. 63 B.R. 361, 367 (1986, BC ND Ohio). Also see Stephen Industries, Inc. v McLung 789 F.2d 386 (6th Cir. 1986) regarding the need for a sound business purpose. No such information was submitted here except the trustee's counsel told the court:

> We can support the (original) settlement (proposal)."

(E.R. 71:3)

The bankruptcy judge responded:

> I believe [the trustee's lawyer] when he says he made the analysis. He just has not set it forth in his papers.

(E.R. 76:18-20)

D. Settlement of Litigation

Before entering into a settlement, the trustee must use due diligence and 1) ascertain all facts necessary to make an informed and objective opinion of the probability of ultimate success if the proceeding is litigated; 2) be apprised of the complexity, expense, and likely duration of the litigation; 3) compare the terms of the compromise with the probable outcome of the litigation; and 4) weigh all factors in order to determine that the compromise is fair. Re Carla Leather, Inc. 44 B.R. 457 (BC SD NY 1984) and see In re Telesphere Communications, Inc. 179 B.R. 544, 560 (BC ND Ill. 1994). There is no such record here.

The court must determine that a settlement is fair and equitable, and it should make findings to demonstrate that the court has considered 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in collecting the judgment; 3) the complexity of the litigation, and the expense, inconvenience, and delay arising therefrom; and 4) the paramount interest of the creditors and a proper deference to their reasonable views concerning the merits of the

settlement. Re A&C Properties 784 F.2d 1377, 1381 (9th Cir. 1986). The bankruptcy judge mentioned the A&C Properties case in his discussion (E.R. 69:9-11), but overlooked it in his order, and there is no such record regarding a fair and equitable sale.

E. Maximizing Value

The "main concern of the court should be maximization of the value of the asset sold." In re Integrated Resources, Inc. 135 B.R. 746, 750 (BC SD NY 1992) aff'd 147 B.R. 650 (SD NY 1992). The court should exercise its discretion to approve a private sale based on the facts and circumstances of the proposed sale. In re Blue Corp. 168 B.R. 553, 564 (BC MD NY 1994). A "grossly inadequate" price is grounds to vacate a sale. Matter of Chung King 753 F.2d 547, 550 (7th Cir. 1985).

CONCLUSION AND PRAYER

In violation of this court's precedent (Protective Committee (*supra*)) and circuit precedent (A&C Properties (*supra*)) the bankruptcy court approved a Chapter 7 trustee's

sale of an asset which debtor claimed is worth $400,000 for $5,000 with no record of an evaluation. By not insisting on an evaluation the bankruptcy court encourages slothful administration (or worse) by bankruptcy trustees.

This matter should be remanded to the circuit court with instructions to follow Protective Committee.

Date: December 17, 1998

Jerome Berg

Petitioner

APPENDIX A

IN THE UNITED STATES COURT APPEALS

FOR THE NINTH CIRCUIT

Filed September 18, 1998

In re JEROME BERG,	)
Debtor,	)
	) Case No. 98-15045
JEROME BERG,	) BAP No. NC-96-1927-
Appellant,	) RyMeH
v.	) MEMORANDUM*
BRENNAN NEWSOM, K.	)
FRANZA GIFFEN, ISIDOOR	)
BORNSTEIN, FRANK BACON,	)
and CHARLES E. SIMS, Trustee,	)
Appellees.	)
	)

Appeal From The Ninth Circuit

Bankruptcy Appellate Panel

Ryan, Meyers, And Hagan, Bankruptcy Judges, Presiding

Submitted September 14, 1998**

Before O'SCANNLAIN, FERNANDEZ, and TASHIMA, Circuit Judges

Chapter 7 debtor Jerome Berg appeals the Bankruptcy

Appellate Panel's ("BAP") decision, filed November 7, 1997, affirming the bankruptcy court's order approving the Chapter 7 trustee's sale of the bankruptcy estate's rights to a lawsuit. We have jurisdiction pursuant to 28 U.S.C. § 158(d). This court independently reviews the bankruptcy court's rulings on appeal from the BAP. See Havelock v Taxel (In re Pace) 67 F.3d 187, 191 (9th Cir. 1995). We review the bankruptcy court's conclusions of law *de novo* and the court's findings of fact for clear error, *see id.*, and we affirm.

We reject Berg's contentions that there was an inadequate record supporting the need to sell the rights to the lawsuit, that the trustee conducted an improper sale of the rights to the lawsuit, that there was no neutral evaluation of the asset, and that the trustee abused his discretion by accepting the winning bid, because Berg raised these objections for the first time in his appeal to the BAP. See Spurlock v F.B.I. 69 F.3d 1010, 1017 (9th Cir. 1995).

AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(A); 9th Cir. R. 34-4.